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February 4, 2016

Department of Transportation
Division of Engineering Services
P.O. Box 168041, MS 43
Sacramento, CA 95816-8041

Attn: John McMillan, Deputy Division Chief

Project: 04-2J0704
Bid Opening: 12/03/2015
Re: Response to Third Protest of DeSilva Gates Construction, LP

Dear Mr. McMillan,

On January 25, 2016, DeSilva Gates Construction, LP ("DGC") submitted a third protest of Bay Cities' bid. There is nothing within DGC's third letter that supports DGC's claim that Bay Cities' bid is nonresponsive. DGC's protest is meritless and must be rejected.

DGC's protest is faulty because it is the product of false assumptions. DGC then misapplies case law to its faulty assumptions and argues that its conclusions cannot be contradicted. Nothing could be further from the truth. California case law provides that not only must a protesting bidder show that there was a bid irregularity but that the bid irregularity provided the low bidder with **an actual advantage**. For instance, DGC argues that the decision in *Valley Crest Landscape, Inc. v. City Council of the City of Davis*, 41 Cal.App.4th 1432 (1996) supports its position. In *Valley Crest*, the City of Davis issued specifications that required the bidders to perform no less than 50% of the work and list the percentage of the bid item price. Using the Contract item bid prices and percentages to calculate subcontractor participation, the City calculated that North Bay was subcontracting 83% of the work. On its face, North Bay's bid was nonresponsive. The City allowed North Bay the opportunity to "correct" its bid so that North Bay would be performing more than 50% of the work. The court in *Valley Crest* held that North Bay's mistake was a material one that the City could not waive because it allowed North Bay an actual advantage. Simply by leaving its bid unchanged, North Bay could escape its bid without having to forfeit its bid bond. North Bay's error was not simply a theoretical advantage but an actual advantage that could not be waived.

Unlike the *Valley Crest* decision, the low bidder's mistake in the *Ghilotti Construction v. City of Richmond* (1996) 45 Cal.App.4th 897 was an immaterial mistake that the City of Richmond was entitled to waive. *Ghilotti* involved a project in which the bid specification required that bidders perform no less than 50% of the contract. The low bidder, GBCI, submitted a bid showing it would be performing 45% of the contract. The low bidder informed the City of Richmond that it

could easily meet the 50% participation level by purchasing some of the subcontractor's material supplies. Like DGC now proposes, the second bidder in *Ghilotti* protested the low bid and argued that it did not conform to the specifications and the City had no choice but to reject it. The City decided the the variation was immaterial and awarded the contract to the low bidder. The appellate court in *Ghilotti* upheld the lower court's decision and held that the variance of 5% was an inconsequential omission that the City of Richmond was empowered to waive.

On its face, Bay Cities' bid shows that it meets the State's requirement that Bay Cities perform at least 30% of the work. Therefore, Bay Cities' bid is unlike the low bid in *Valley Crest*. DGC has argued repeatedly that Bay Cities has mis-calculated the percentage of Bay Cities' participation and that, if Bay Cities is furnishing Vanguard's materials, then Bay Cities participation would be higher than Bay Cities anticipated. But DGC has been unable to provide any evidence to show any error on Bay Cities' part. In effect, DGC argues that Bay Cities has miscalculated the costs of Vanguard's materials by roughly $1.6 million dollars. Bay Cities' DBE form shows that Bay Cities will be performing 31% of the work. Even if all of DGC's calculations were exactly correct–which they are not– then Bay Cities would be performing 34% of the total contract instead of 31%.

DGC has failed to make even the pretense of arguing that Bay Cities would have some advantage over other bidders. The low bidder in *Valley Crest* had the actual advantage of withdrawing its bid without danger of forfeiting its bid bond. Bay Cities' has no such advantage. The Contract requires that the contractor perform a minimum 30% of the work with its own forces. Even if everything that DGC claims is true, Bay Cities will be performing 34% of the contract instead of 31%. No court would ever hold that a bidder could be allowed to withdraw his bid without penalty because he planned to perform 31% of the bid but will instead perform 34%. This argument is nonsense and akin to arguing that a bid which includes a 11% bid bond instead of a 10% bid bond must be rejected because it provides some theoretical advantage to the bidder.

DGC has also distorted the holding of *MCM Construction, Inc. v. City and County of San Francisco* (1998) Cal.App.4th 359 in a failed attempt to support its position. In *MCM*, the low bidder failed to list the price to be paid to seven of its nine subcontractors as required by the City's specifications. The court held that the City had the discretion to enforce its bid requirements against the low bidder. DGC has cited the decision in *MCM* for the proposition that the:

> "The Court held that the City of San Francisco was required to reject a contractor's bid because the bidder had failed to comply with a bid solicitation requirement that it state on its List of Subcontractors, the dollar amount of work to be performed by several subcontractors."

DGC's argument regarding the court's holding has been rebutted by the court itself. In the recent decision of *Bay Cities v. City of San Leandro* (2014) 223 Cal. App. 4th 118, the appellant argued that, under the *MCM* decision, the City was required to reject the low bidder's bid as DGC now argues. In response, the court wrote:

> Appellant purports to find support in our opinion in *MCM*, noting that we said there that

> "[t]he City was without power to waive the deviation." (*MCM, supra, 66 Cal.App.4th at p. 377.*) However, we reached that conclusion only after affirming the city's *factual* determination that the bid defect in that case was material and not inconsequential. Indeed, we cited *Ghilotti, supra, 45 Cal.App.4th at page 906*, for the proposition that the question whether " ' "a bid varies substantially or only inconsequentially from the call for bids is a question of fact." [Citation.]' " (*MCM, supra, 66 Cal.App.4th at p. 375.*) Here, we apply precisely the same rules that we applied in *MCM*, albeit to a very different set of facts.

Although DGC has cited *MCM* to support its position, the court's holdings in *MCM* and *Bay Cities* directly undercut DGC's argument. To determine if a bid is nonresponsive, the State first has to make a factual determination that a deviation was made and then make the subsequent determination that deviation provided the bidder with an actual advantage. In *MCM*, the City awarded the project to Myers/Kulchin after determining that its bid contained a defect but the defect was waivable because it not affect the amount of the bid or give an unfair advantage to Myers. In *Ghilotti, MCM*, and *Bay Cities*, the public entities awarded the bids to bidders after determining that any defects that were made by these bidders were insignificant.

DGC has submitted unfounded speculation regarding Bay Cities' bid and then twisted court decisions to argue that Bay Cities' bid should be rejected. There is no basis to DGC's protests and they should be rejected as meritless.

Sincerely,

Marlo Manqueros
Vice-President

cc: File